No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,
Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF NATIONAL MASS RETAILING INSTITUTE IN SUPPORT OF AFFIRMANCE

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July 18, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF AMICUS CURIAE OF NATIONAL MASS RETAILING INSTITUTE IN SUPPORT OF AFFIRMANCE[1]

INTEREST OF AMICUS CURIAE

The National Mass Retailing Institute ("NMRI") is a non-profit organization with a principal purpose of promoting and advancing the interests of its mass retail merchant members. NMRI's 125 members operate over 10,000 retail stores in the continental United States and, together, have a gross annual sales volume well over sixty billion dollars. NMRI member stores are known as "discount retail stores." They operate at low profit margins and sell a high volume of goods at prices well below the manufacturers' suggested list prices.

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[1] This brief is filed with the consent of the parties pursuant to Supreme Court Rule 36.2. The written consents have been filed with the Clerk of the Court.

The discount retail industry has enjoyed explosive growth in the last two decades.[2] NMRI offers a simple explanation for that growth: American consumers have turned to discount stores because those stores offer an attractive blend of low prices and desired services. Because discount retailers and consumers benefit from a retailer's right to offer low prices, NMRI is vitally interested in the preservation of the rule of antitrust law that resale price maintenance is illegal per se. The discount industry owes its success, and its survival, to a retailer's ability to be competitive in the pricing and marketing of brand-name goods.

NMRI submits this brief to urge the Court to continue 70 years of antitrust jurisprudence and to respect the intent of Congress by condemning agreements fixing resale prices as per se violative of our nation's antitrust laws.

SUMMARY OF ARGUMENT

The briefs of petitioner and the United States, as amicus curiae in support of reversal, tug this Court in different directions. Monsanto Company ("Monsanto"), in effect, asks the Court to reverse the court below by rejecting factual findings made by a properly instructed jury and reviewed thoroughly by the court of appeals. The United States, in contrast, asks the Court to reverse the court below by discarding a whole body of settled law. Neither course of action is correct.

While NMRI does not claim to share the parties' familiarity with the record, it would, nonetheless, appear from the instructions to the jury, the jury's answers to special interrogatories, and the court of appeals opinion that a jury could reasonably and properly conclude that Mon-

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[2] A statistical profile of the discount industry is found in *The True Look of the Discount Industry*, 23 The Discount Merchandiser 40 (1983). That publication's statistics show that the dollar volume of sales made by surveyed discount stores increased by 2800% from 1960 to 1982. *Id.* at 42.

santo did in fact enter into an agreement with some of its distributors to maintain resale prices and that, to further that scheme, Monsanto and its distributors agreed to employ certain non-price restraints. Those findings reflect a central policy of antitrust law: a distributor should be free to calculate its own resale price. An agreement that eliminates the distributor's freedom to offer low prices is anticompetitive.

There is a critical flaw in the arguments advanced by petitioner and its supporting amici curiae in denying that a price fixing agreement was ever made. Petitioner and its supporting amici assume that low prices necessarily beget poor service. That hypothesis leads them to conclude that distributor complaints about a competitor's low prices are tantamount to complaints about that competitor's poor service to its customers. NMRI submits that such reasoning is hollow and is no basis for rewriting antitrust law.

As a matter of law, proof that some distributors complained about the pricing of Spray-Rite Service Corporation ("Spray-Rite"), but not about its service, and that, as a result, Monsanto terminated Spray-Rite, without stating any non-price reason, is sufficient evidence to allow the jury to find that Monsanto and its distributors agreed to maintain resale prices. A jury instruction that permits the jury to find an unlawful agreement based on such proof correctly states the law and serves the policy underlying that law. While the jury might have found that Monsanto had a legitimate non-price reason for terminating Spray-Rite, it chose, instead, to believe Spray-Rite's version of the facts. That is the jury's assigned task.

The trial court's instructions to the jury concerning non-price restrictions also correctly state the law. The trial court stated that non-price restrictions are anticompetitive if they are used to effectuate resale price maintenance, but that a mere effect on resale prices does not necessarily make a manufacturer's distribution pro-

gram part of a resale price maintenance scheme. Under those instructions, the jury could have found that Monsanto's non-price restraints were unilaterally adopted for a procompetitive reason; instead, the jury, again performing its assigned task, chose not to accept Monsanto's explanation of the evidence. In short, the instructions to the jury on agreement and on non-price restraints were proper.

NMRI's primary argument, however, is addressed neither to the sufficiency of the evidence nor to the adequacy of the jury instructions. Rather, NMRI urges this Court to preserve settled antitrust law condemning resale price maintenance. There is no basis, factual or theoretical, for abolishing the rule that resale price maintenance is illegal per se.

The per se rule makes sound economic sense: resale price maintenance not only raises consumer prices, thereby diminishing consumer welfare and adding to inflation, but also impedes the development of efficient forms of retailing and facilitates horizontal price fixing at all levels of the distribution chain. Nor is resale price maintenance necessary to accomplish any legitimate goal of a manufacturer, such as the provision of a certain level of services. A manufacturer has many direct means available to it to require the provision of services; fixing a retailer's profit margin does not, either logically or practically, lead to better retail performance. The "free-rider" justification for resale price maintenance advanced by the United States erroneously equates discounting with poor service. NMRI vigorously disputes that equation and submits that low price and good service can, and do, go hand-in-hand.

Congress, too, has explicitly rejected the "free-rider" justification for resale price fixing. In 1975, by enacting the Consumer Goods Pricing Act,[3] Congress declared that

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[3] Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).

resale price maintenance is illegal per se. As this Court recognized in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1976), that Act not only reflects Congress' interpretation of Section 1 of the Sherman Act, 15 U.S.C. § 1, but is positive substantive law in its own right. If any change is to be made in that rule of law, NMRI respectfully submits that it is Congress, and not the judiciary, which should make that change.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE JURY'S FINDING OF FACT AND TRIAL COURT'S INSTRUCTIONS ON THE LAW.

Much of the petitioner's concern in this case is with the jury's competence, and its wisdom, in finding that Monsanto terminated Spray-Rite because Spray-Rite sold herbicides at discount prices.[4] Amici curiae in support of petitioner similarly question the sufficiency of the evidence and the ability of the jury to find the truth.[5]

However, in inviting this Court to question the jury's competence and to review the sufficiency of the evidence, petitioner and supporting amici misperceive the function of the Court. This Court, "[a] court of law . . . rather

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[4] *See, e.g.*, Brief of Petitioner Monsanto Company 18 ("Pet. Br."): "The evidence does not establish either that Monsanto engaged in a price-fixing conspiracy or that Monsanto's non-price programs were part of such a conspiracy." *See also* Pet. App. D-2 (petitioner's trial counsel's remark that "I just don't think—I don't think the jury is in a case like this capable of understanding these kinds of distinctions.")

[5] *See, e.g.*, Brief of the National Association of Manufacturers 9 ("NAM Br.") (". . . juror responses to generalized jury inquiries of the type used in *Monsanto* are essentially unpredictable, and hence verdicts are likely to turn on subjective impression."); Brief of National Agricultural Chemicals Association 11 ("NACA Br.") ("If this is a correct summary of the record, there were no resale price maintenance agreements proved in the instant case . . . .")

than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). NMRI respectfully submits that the court of appeals decision should be affirmed because it accurately states the standard for reviewing the sufficiency of the evidence and properly applies that test (Pet. App. 13-18).

To complement the evidentiary challenge, petitioner and supporting amici also contest the trial court's instructions of law to the jury and the appellate court's review of those instructions. Without endorsing the language of any particular instruction, NMRI wishes to address some of the fallacies in the arguments advanced against the legal standards employed by the courts below. In particular, NMRI vigorously disputes the contention that low-price retailers are necessarily "free riders" who fail to provide services. Efficient retailers can and do offer both low prices and good services.

A. Complaints About a Distributor's Low Prices Do Not Prove That the Distributor Is a "Free Rider": Competitive Prices and Good Service Go Hand-In-Hand.

The record reveals, and petitioner concedes, that Spray-Rite's distributor competitors made complaints to Monsanto about Spray-Rite's *prices* (Pet. Br. 10, 12). No evidence is cited that those competitors complained about Spray-Rite's *services* to its customers or its promotion of Monsanto's product. There apparently is evidence in the record offered to show that Spray-Rite was innovative and provided good service.[6] The absence of complaints about service and the presence of complaints about prices

[6] *See* Brief in Opposition to Petition for Writ of Certiorari of Spray-Rite Service Corporation 4 and record citations provided therein.

allowed the jury to deduce the competitors' probable purpose in complaining to Monsanto: to rid the market of a low-price seller, not to cure the service inadequacies of a "free-rider."

Petitioner and its supporting amici try to justify the distributors' complaints about a competitor's price by fashioning a two-step argument. First, they contend that antitrust law should encourage communications between a supplier and its dealers.[7] NMRI has no quarrel with that general observation and, indeed, agrees with the United States' assertion that ". . . it is the distributors who may have the best perception of how marketing policies fare in practice." (Brief for the United States 5 ("U.S. Br."); *see also id.* at 10-11.)

However, in devising their justification for distributors' price complaints against a competitor and for the manufacturer's subsequent termination of the low-price competitor, petitioner and its supporting amici take an illogical second step, one that fails to appreciate the difference between distributors' complaints about a competitor's *prices* and distributors' complaints about a competitor's *non-price* conduct. Petitioner and supporting amici contend that distributors' complaints about a competitor's price are tantamount to complaints about that competitor's service, because, they claim, a distributor which discounts is likely to provide inadequate service.[8]

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[7] *E.g.*, NACA Br. 3.

[8] *E.g.*, NACA Br. 5 (". . . a distributor who disregards non-price restrictions . . . will often be a price discounter."); *Id.* at 9 (". . . disregard of non-price restrictions and substantial discounting commonly go together. . . ."); NAM Br. 7 (". . . substantial price cutting is likely to be indicative of failure to provide sales and educational services, . . ."); U.S. Br. 10-11 n.14 (". . . a dealer who maintains low prices either is a highly-prized dealer to the manufacturer, often having atypically low costs . . . or else is a potentially disruptive dealer that may be cutting costs by free-riding on the marketing programs of other dealers.")

The correlation of low price with poor service is crude speculation, unaccompanied by any proof in this record or in the economic or legal literature. The proffered hypothesis that low price begets low service is hardly a sound basis for spurning settled antitrust law and fashioning new antitrust policy. Indeed, to imply that high prices guarantee better service defies common experience. Service and price are two entirely different concerns, on separate continua.

NMRI respectfully submits that the discount retail industry's success derives from providing that combination of service and low prices which satisfies consumers. A retailer simply cannot remain in business if it completely eschews service and concentrates solely on low price—that retailer will never enjoy the loyalty of consumers who appreciate proper treatment. A retailer must, instead, offer the consumer the proper blend of product, advertising, product information, price, servicing, warranties, and shopping amenities.[9]

In sum, a complaint directed solely to a discounter's price, but not to its level of service, cannot be considered a concern with a "free-rider" that is failing to satisfy a manufacturer's non-price requirements. A price complaint contains not a hint of information that the manufacturer's service requirements are being ignored by the discounter. Rather, the complaint reveals the complainant's own inefficiencies and disdain for price competition. Thus, NMRI submits, proof of complaints about price is highly probative of the anticompetitive motive of the complainants: a desire to be free from price competition.

Proof that termination by the manufacturer followed such complaints *and was a result of the price complaints*

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[9] *See* C. Mueller, *Interviews With Discount Retailers*,—Antitrust Law & Econ. Rev.—(forthcoming, available Sept. 1983) (discussing discount retailers' provision of service).

can complete the price-fixing conspiracy. As the court of appeals below held: "Proof of distributorship termination *in response to* competing distributors' complaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action." *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1239 (7th Cir. 1982), Pet. App. 15-16 (emphasis added). The court below concluded that there was sufficient evidence that the termination was "in response" to the price complaints: Monsanto never told Spray-Rite that there was any valid reason for termination, such as that Spray-Rite failed to meet Monsanto's non-price criteria. 684 F.2d at 1239, Pet. App. 17. The court concluded that the evidence refuted Monsanto's allegation that it had an independent business reason for the termination. 684 F.2d at 1239 n.8, Pet. App. 17. That factual review need not be duplicated by this Court, particularly in light of Monsanto's admission that it encouraged distributors to observe suggested resale prices. Pet. Br. 11-12.

The petitioner and its supporting amici predict that the court of appeals quite straightforward ruling on the law of conspiracy will eradicate the manufacturer's right to impose non-price restraints by encouraging spurious suits and increasing the risk of treble damages. *E.g.*, NACA Br. 6 and NAM Br. 8. That fear seems grossly overstated. Indeed, the United States Court of Appeals for the Ninth Circuit only last month affirmed a grant of summary judgment in a dealer termination case, distinguishing *Spray-Rite* as a case requiring "sufficient evidence to show that the termination was *in response to* [price-related] complaints by competitors." *Filco v. Amana Refrigeration, Inc.*, No. 81-4604, slip op. at 7 (9th Cir. June 10, 1983). The *Filco* opinion punctures over-inflated fears that manufacturers will be handicapped by the decision below in enforcing legitimate, non-price distribution requirements.

In sum, the court of appeals decision is hardly extraordinary. The court concluded that when distributors complain about another distributor's prices—but not about that distributor's provision of service—and when the manufacturer terminates that distributor as a result of those complaints, and for no other expressed reason, the jury may—but is not compelled to—find that there was an illegal agreement to maintain prices. A manufacturer interested in requiring its distributors to comply with reasonable non-price requirements is not handicapped by that rule. That manufacturer need only instruct its distributors not to report price complaints but instead, to report any failures to provide adequate service. Even should the manufacturer receive price complaints, it may terminate a distributor if it can provide an independent and adequate non-price rationale for the termination.

B. Non-Price Restraints Are Anticompetitive When They Are Part of an Agreement to Fix or to Maintain Resale Prices.

Petitioner (Pet. Br. 3) seizes upon one sentence in the court of appeals opinion which suggests that non-price vertical restraints may be condemned as illegal per se simply because a plaintiff "alleges" that those restraints are part of a conspiracy to fix prices. 684 F.2d at 1237, Pet. App. 12. While that sentence is not as precise as it might be, it appears to be taken out of context.

First, the court of appeals also stated, 684 F.2d at 1237, Pet. App. 13 (emphasis added):

> In this case, the court instructed the jury that Monsanto's otherwise lawful compensation programs and shipping policies were per se unlawful *if undertaken as part of an illegal scheme to fix prices.* We find . . . that this instruction is accurate. "In any price-fixing case restrictive practices ancillary to the price-fixing scheme are also quite properly re-

> strained." *White Motor Co. v. United States*, 372 U.S. 253, 260 (1963) . . . .

That is a correct statement of the law. *E.g.*, *United States v. Sealy, Inc.*, 388 U.S. 350, 356-57 (1967).

Second, the trial court did not instruct the jury that mere "allegations" that non-price restraints were part of the price-fixing scheme permitted invocation of the per se rule. To the contrary, the trial court instructed the jury that certain non-price restrictions are per se illegal only if they are used to effectuate resale price maintenance and that a mere effect on resale prices does not necessarily make a manufacturer's distribution program part of a resale price maintenance scheme. Tr. 4356 and 4364-65, cited in part at 684 F.2d at 1236 n.5, Pet. App. 11.

Third, the record reflects that Spray-Rite offered evidence—and not mere allegations—that the non-price restrictions were part of the price fixing scheme. *See* Brief in Opposition to Petition for Writ of Certiorari of Spray-Rite Service Corporation 18-19 n.11 and record citations. That is, Monsanto's "primary responsibility" program was argued to serve the purpose of limiting price cutting. *Id.*, citing Tr. 1936-1937.

Fourth, the jury specifically found, by special interrogatory, that the non-price restraints were "created . . . pursuant to a conspiracy to fix, maintain or stabilize resale prices on Monsanto herbicides . . .[.]" 684 F.2d at 1233, Pet. App. 4-5. The language of that interrogatory precludes any argument that the jury did not know the law: the interrogatory itself required a conclusion that the non-price restraints were "pursuant to" a price fixing conspiracy.

In sum, the record demonstrates that a properly instructed jury found that Monsanto's non-price distribution restraints were part of the resale price maintenance scheme and did not represent the manufacturer's unilateral judgment on the proper marketing of its product.

II. THE RULE THAT RESALE PRICE MAINTENANCE IS ILLEGAL PER SE IS CORRECT AND REPRESENTS THE EXPLICIT WILL OF CONGRESS.

This Court has long recognized that, because price competition is the "central nervous system" of our economy, any agreement that interferes with the setting of price by free market forces is "illegal on its face." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), *citing United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940). This precept is not limited to interbrand price competition. As this court has recognized at every opportunity, intrabrand price competition is also a desired end of our nation's antitrust laws. Thus, on every occasion when resale price maintenance agreements have been before this Court, they have been condemned as illegal per se.[10] This Court's established precedent that resale price fixing is illegal per se should not be lightly discarded, particularly where the defendant charged with the unlawful conduct does not choose to challenge the rule of law. *See* Pet. Br. i ("Questions Presented").

The United States, however, as amicus curiae in support of reversal, directly assaults 70 years of this Court's precedent and seeks a drastic change in antitrust law. NMRI submits that the present law is correct and represents the will of Congress: an agreement to fix or to maintain resale prices is illegal per se.

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[10] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404, 409 (1911); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951); Simpson v. Union Oil Co., 377 U.S. 13, 17, 18 (1964); Albrecht v. Herald Co., 390 U.S. 145, 151-52 (1968); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18 (1976); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-03 (1980); Rice v. Norman Williams Co., —— U.S. ——, 102 S.Ct. 3294, 3299 (1982).

A. Resale Price Maintenance Should Be Illegal Per Se Because the Demonstrated Harms Caused by the Practice Far Outweigh any Theoretical Benefits.

Fully one-third of the United States brief is devoted to a theoretical explanation of the benefits of resale price maintenance and to an attack on this Court's "inconsistent" justification for the per se rule condemning the practice (U.S. Br. 19-29).[11] The United States' discussion eloquently recites lofty law review articles, but fails totally to consider the actual evidence showing that resale price maintenance causes definite harm. The evils of resale price maintenance include increased prices; injury to newer, more efficient forms of retailing; the provision of undesired services; and the facilitation of horizontal price fixing.

First, studies conducted by the United States in the past demonstrate that resale price fixing substantially raises consumer prices.[12] This Court, too, has recognized that obvious economic fact. Indeed, one of the bases for the seminal *Dr. Miles* opinion, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), was that

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[11] The United States asserts: "Indeed, the Court's few discussions of the basis for the per se ban during the last 70 years have not been consistent in justifying the rule." U.S. Br. 24.

[12] In 1975, when Congress enacted the Consumer Goods Pricing Act, it received testimony from then Assistant Attorney General for Antitrust Thomas Kauper which described studies detailing the cost to consumers of "Fair Trade" laws. Hearings on S.408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 173-75 (1975) [hereinafter cited as *Senate Hearings*]. According to one Antitrust Division survey, resale prices when freely determined by retailers ranged from 0.2% to 37.4% below the resale price when set by a manufacturer. Another survey showed that when resale prices were fixed, the consumer paid on the average of 19-27% higher for the goods. *Id.* at 174. One economist from the University of California estimated that the cost of the "Fair Trade" laws, allowing resale price fixing, was approximately $6.5 billion in 1975 alone. *Id.* at 151.

the effects caused by resale price fixing, higher prices, are the same as if the distributors collectively agreed upon a fixed price. *Id.* at 407-09.

The Department of Justice criticizes that thread of *Dr. Miles* as being inconsistent with the manufacturer's economic objective to earn higher profits (U.S. Br. 25) and also inconsistent with this Court's other rationale offered for the per se rule, i.e., that resale price maintenance deprives "independent dealers of the exercise of free judgment." (U.S. Br. 26, *citing Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964)). There are no inconsistencies: this Court's rationales in *Dr. Miles* and *Simpson* are compatible and the *Dr. Miles* opinion tracks economic theories of short-run profit maximization.

The resale price maintenance agreement and the termination of a discounter may reflect the manufacturer's choice to accede to the wishes of certain disgruntled and inefficient distributors which, because of long-established relations, may have more combined clout at that time with the manufacturer than does the terminated distributor. The agreement and the termination, then, may cause effects identical to a dealer price fixing cartel (higher prices) while at the same time stripping the independent, i.e., competitive, distributor of its free judgment to price the goods as it sees fit. While resale price maintenance raises prices to consumers, and thereby lowers output, the manufacturer, is, nonetheless, content with that scheme because short-run output, in its opinion, might be even lower if it failed to satisfy its established, but inefficient, distributors' needs to be free of competition.[13]

This discussion leads to the second definite harm caused by resale price maintenance: the inhibitions on new and

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[13] *See generally* J. R. Gould and B. S. Yamey, *Professor Bork on Vertical Price Fixing*, 76 Yale L.J. 722 (1966) (discussing other instances of resale price maintenance where output is reduced) [hereinafter cited as Gould and Yamey].

more efficient forms of retailing. Resale price fixing may shore up inefficient distributors by freeing them from the obligations of competition with more efficient, low cost retailers.[14] In the present case, for example, there is record evidence that Spray-Rite was an efficient distributor of Monsanto herbicides and was perceived as innovative and a provider of good services. Spray-Rite's termination may thus have cost the marketplace an efficient distributor.

A third harm of resale price maintenance is the frequent imposition of undesired services. That is, resale price maintenance "restricts the range of consumers' choice."[15] If, as claimed by the United States, a resale price maintenance scheme will ordinarily be accompanied by some requirement that the distributor offer a particular amount of pre-sale and/or post-sale services, the consumer must accept not only those services, but must also pay the price decreed by the manufacturer. The consumer will have no other choice. However, absent resale price maintenance, the consumer would have a choice, at least a choice on price. That is, while the manufacturer might, absent resale price maintenance, still insist by contract that the retailer provide post-sale and/or pre-sale serv-

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[14] *See Senate Hearings, supra* note 12, at 322-39 (Library of Congress Study which demonstrated, inter alia, that there were greater numbers of business failures in states allowing resale price maintenance than in states prohibiting resale price maintenance and that there were higher sales per stores in areas where resale price maintenance was prohibited than in areas where the practice was allowed). *See also* Gould and Yamey, *supra* note 13, at 729; Yamey, *Introduction*, in Resale Price Maintenance 4 (B.S. Yamey ed. 1966) (". . . the independent pricing decisions of competing retailers and the responses of consumers lead to the elimination of the least efficient retailers, to the expansion (including the establishment) of more efficient firms, and to the availability of a range of competing offerings of different combinations of retail prices and services to meet the varied and varying preferences of consumers.") [hereinafter cited as Yamey].

[15] Gould and Yamey, *supra* note 13, at 729.

ices, an efficient retailer will be able to satisfy those contractual demands and still beat his competitor on price. With resale price maintenance, in contrast, an efficient retailer providing the post-sale and pre-sale services required by the manufacturer still cannot benefit from the efficiencies of its operation by offering a lower price; it is forced to accept a higher profit margin that it would otherwise like. That higher profit margin represents a direct consumer loss.

Moreover, if the resale price maintenance scheme is not accompanied by post-sale and pre-sale service contractual requirements, but is instead merely intended to be an inducement to provide those requirements, the consumer is even more so the loser. The company that did not provide service in the past will not be obligated to do so in the future; it may simply pocket higher prices for the manufacturer's goods. Conversely, a retailer that feels compelled to offer more services to justify its higher profit margin may be providing something the consumer does not want: unnecessary frills.

There is yet another cost to resale price maintenance. It facilitates horizontal price fixing at all levels of the distribution chain. As stated by then Assistant Attorney General for Antitrust Thomas Kauper during the 1975 hearings:

> Price competition at retail may result in increasing price competition at the manufacturer's level. Especially in concentrated industries, manufacturers may well be reluctant to see vigorous price competition at the retail level, since this may threaten general price stability in the industry, and price stability is frequently sought and desired in oligopolistic industries.[16]

Resale price maintenance may affect competition at the manufacturing level in other ways. For example, eliminating or restricting price competition in retailing may

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[16] *Senate Hearings, supra* note 12, at 175.

"prevent or retard the growth of large firms in retailing, and thereby inhibit the building-up or strengthening of bargaining power which could be used to disrupt price agreements or non-collusive oligopolistic price structures in supplying industries." Yamey, *supra* note 14, at 10.

Finally, resale price maintenance agreements "reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." *White Motor Co. v. United States*, 372 U.S. 253, 268 (1963) (Brennan J., concurring).[17] In other words, resale price fixing can reduce interbrand price competition, as well as thwart intrabrand price competition, because distributors are restrained from lowering prices to meet, or beat, competition from other brands.

The harms described in the preceding paragraphs are substantial; to overcome them, the United States offers simply a theoretical and unproven argument that high resale price margins are necessary to guarantee good service. This argument, the so-called "free-rider" argument, deserves scant attention.

To begin with, the entire argument rests upon the premise that low price retailers do not provide service. That hypothesis is incorrect and ignores the substantial successes to date of discount retailers. A low price is more consistent with efficient operations than with poor service. The argument also seems to envision a class of ignorant consumers who do not have the sense to purchase services that the manufacturer believes they need to enjoy the product. Finally, the argument fails because a high resale price is no guarantee that services will in fact be performed. The simple availability of higher profits to a retailer does not guarantee good retail performance—to the contrary, it may serve as an artificial incentive to be inefficient.

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[17] *See Albrecht, supra* note 10, 390 U.S. at 152 n.7 (resale price maintenance may "alleviate" interbrand price competition).

Moreover, even if there is a "free rider" problem, a manufacturer ordinarily has alternatives other than price fixing available to it to monitor the provision of desired services. Those alternatives—when not a part of a price fixing scheme—are not subject to a per se rule. For example, a manufacturer ordinarily may appoint an exclusive dealer in a particular area. *E.g., Oreck Corp. v. Whirlpool Corp.*, 563 F.2d 54 (2d Cir. 1977), 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978). A manufacturer ordinarily may prohibit its authorized distributors from transshipping goods to unauthorized distributors. *E.g., Rice v. Norman Williams Co.*, —— U.S. ——, 102 S.Ct. 3294 (1982). A manufacturer ordinarily is able to bestow an exclusive territory upon a dealer. *E.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). And a manufacturer, for safety and other service reasons, may impose various non-price restraints on its distributors. *E.g., Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970) (restrictions on sales to professional end users for safety reasons); *Mitchell v. U.S. Surgical Corp.*, 1976-1 Trade Cas. ¶ 60,879 (S.D. Ohio 1976) (restrictions on sales outside territory to ensure prompt service and to protect safety of ultimate consumers).

In short, there is a host of non-price alternatives available to the manufacturer who perceives that it has a "free-rider" problem and wants better control over its distributors. Under present law, however, the only distribution restraint alternative which is *never* available to a manufacturer is the fixing or maintenance of the resale price and, either by coercion or agreement, requiring that its distributors follow that price.[18]

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[18] Of course, a manufacturer may, if it otherwise acts unilaterally and employs no means to coerce adherence to suggested resale prices, refuse to deal with a company that it perceives to be a discount[illegible]e, *e.g.*, Garrett's Inc. v. Farah Mfg. Co., 412 F. Supp. 656 (D. [illegible]976) (upholding refusal to sell to price cutter in

B. Congress Has Determined That Resale Price Maintenance Should Be Illegal Per Se.

NMRI submits that the Consumer Goods Pricing Act of 1975 is an express recognition that resale price maintenance is per se illegal. Indeed, this Court has already indicated that the Consumer Goods Pricing Act is a ratification that resale price fixing is per se unlawful:

> . . . Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual states . . . .

GTE Sylvania, supra, 433 U.S. at 51 n.18.

The Consumer Goods Pricing Act is more than approval of this Court's per se analysis. It is positive, substantive law in its own right, establishing that resale price maintenance is per se unlawful. Adopting the language of this Court in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 379-82 (1982), the fact that Congress conducted a comprehensive reexamination of vertical price fixing under the Sherman Act and left intact those statutory provisions under which the federal courts had crafted the per se rule against resale price maintenance is itself evidence that Congress affirmatively intended to preserve that law. That is, Congress, in repealing the federal statutory basis for "Fair Trade" laws found in the Miller-Tydings and McGuire Acts, was clearly conscious of, and intended to adopt, judicial precedent which established that resale price maintenance is per se unlawful. The passage of the Consumer Goods Pricing Act of 1975 is thus tantamount to an explicit legislative directive that resale price maintenance is per se unlawful. *See Bob Jones University v. United States*,

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absence of coercion by seller or other parties enlisted by supplier); Graham v. Triangle Publications, Inc., 233 F. Supp. 825 (E.D. Pa. 1964), *aff'd per curiam*, 344 F.2d 775 (3d Cir. 1965). *See also* In Re Russell Stover Candies, Inc., No. 9140, slip op. (FTC July 7, 1982).

—— U.S. ——, 51 U.S.L.W. 4593, 4600-01 (U.S. May 24, 1983) (congressional legislation following administrative and judicial interpretation is "manifest[] . . . acquiescence" in interpretation).

In *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), this Court stated:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . . So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Even if the 1975 Consumer Goods Pricing Act is not considered to be positive substantive law in its own right, the legislative history of that Act is relevant in construing the Sherman Act. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), this Court stated that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Id.* at 380-81.[19]

The legislative history of the Consumer Goods Pricing Act quite emphatically demonstrates that Congress intended to perpetuate a per se rule. To begin with, both the Senate and House Reports on the bill provide that resale price maintenance should be illegal per se. The Senate Report states (emphasis added):

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[19] The United States (U.S. Br. 28 n.41) argues that the views of legislators in enacting the Consumer Goods Pricing Act do not offer much assistance to this Court in construing the Sherman Act. This Court has repeatedly recognized that "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight, . . . and particularly so when the precise intent of the enacting Congress is obscure." Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980). *See* Federal Housing Admin. v. The Darlington, Inc., 358 U.S. 84, 90 (1958).

> This proposed legislation repeals the Miller-Tydings Act which enables the States to enact fair trade laws and the McGuire Act which permits states to enact nonsigner provisions. *Without these exemptions the agreements they authorize would violate the antitrust laws.*[20]

The House Report was even more explicit:

> An agreement between a manufacturer and a retailer that the retailer will not resell the manufacturer's product below a specified price is an abvious [sic] form of price fixing. As such it is *per se* illegal under Section 1 of the Sherman Act.[21]

Both the House and Senate sponsors, in explaining the legislation to their colleagues, emphasized that the effect of the Consumer Goods Pricing Act was to submit resale price fixing agreements to the per se standard. For example, Rep. Rodino, Chairman of the House Judiciary Committee and the Subcommittee on Monopolies and Commercial Law and a co-sponsor of the bill, stated, while presiding over Subcommittee hearings, that resale price maintenance would be per se illegal on passage of the Consumer Goods Pricing Act:

> Agreements, whether vertical or horizontal, to fix and maintain prices are a classic restraint of trade. They have long been considered per se illegal under our antitrust laws.[22]

Sen. Brooke, the Senate sponsor of the bill, stated:

> Without these Federal statutes [the Fair Trade laws], these interstate price-fixing conspiracies would be in violation of the most basic of our antitrust

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[20] S. Rep. No. 466, 94th Cong., 1st Sess. 1 (1975) [hereinafter cited as *Senate Report*].

[21] H.R. Rep. No. 341, 94th Cong., 1st Sess. 2 (1975) [hereinafter cited as *House Report*].

[22] Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the House Judiciary Comm., 94th Cong., 1st Sess. 1 (1975) [hereinafter cited as *House Hearings*].

> laws—the Sherman Antitrust Act and the Federal Trade Commission Act.[23]

Further evidence of Congressional intent is found throughout the remarks of sponsors of the legislation, other Congressmen, and witnesses testifying for the House and Senate Committees.[24]

The final proof of the purpose of the Consumer Goods Pricing Act of 1975 is found in the statement of then President Gerald R. Ford who, upon signing the bill, stated that the legislation

> . . . will make it illegal for manufacturers to fix the prices of consumer products sold by retailers. This new legislation will repeal laws . . . which amended the Federal antitrust laws so States could authorize otherwise illegal agreements between manufacturers and retailers setting the price at which a product would be sold to consumers.[25]

In sum, Congress has spoken: resale price maintenance is illegal per se. The Consumer Goods Pricing Act of 1975 is positive substantive law in its own right and, in addition, represents Congress' construction of the substantive scope of the Sherman Act.

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[23] 121 Cong. Rec. 38,049-50 (1975).

[24] *E.g.*, 121 Cong. Rec. 23,660 (1975) (remarks of Rep. Hutchinson) ("Upon enactment of this bill it would be a violation of the Federal Antitrust Act for a manufacturer to set a minimum retail price for any item he makes; that would be price fixing."); 121 Cong. Rec. 23,662 (1975) (remarks of Rep. Seiberling) (". . . resale price maintenance [is] . . . a per se violation of the Federal antitrust laws."); *Senate Hearings*, *supra* note 12, at 13 (exchange between Sen. Hruska and Federal Trade Commission Chairman Louis A. Engman that a manufacturer's exacting a promise from a dealer not to sell below a particular price "would not be legal" and "would then constitute price-fixing under the Sherman Antitrust Law . . . [.]").

[25] 11 Weekly Comp. Pres. Doc. 1368 (Dec. 12, 1975).

C. Congress, and Not the Judiciary, Is the Proper Branch of Government to Consider a Change in the Law.

The United States suggests that this Court has clear authority to change the rule of law that resale price maintenance is illegal per se. (U.S. Br. 20 & nn.28, 29). While this Court has unquestioned authority to determine whether a particular defendant has violated the antitrust laws, it is another matter altogether for this Court to abandon years of judicial precedent, particularly where Congress has endorsed the precedent and the defendant before the Court does not seek to change the extant standard.

Only last year this Court recognized that it is Congress, and not the judiciary, which should consider changes to established per se rules. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 2478-79 (1982) (". . . arguments against application of the per se rule in this case therefore are better directed to the legislature.")

Particularly with respect to resale price maintenance, reconsideration of the policy is better left to Congress. First, there is no question that Congress has been aware of this Court's precedent.[26] Where Congress is aware of this Court's precedent and has chosen not to change it, this Court is properly hesitant to change the law. *E.g.*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736-37 (1977) (". . . considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."); *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) (in upholding the long-time exemption of professional baseball from the

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[26] *See, e.g., House Report, supra* note 21, at 2 ("The Supreme Court first condemned resale price maintenance agreements under the Sherman Act 64 years ago . . . . In a line of subsequent decisions the Court has consistently held that such agreements are in direct violation of the system of free competition which the antitrust laws are designed to promote. [citing five opinions of this Court].").

antitrust laws the Court noted that "[i]f there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to Congressional intent in [precedent discussing the baseball exemption] . . . ."). *See Radovich v. National Football League*, 352 U.S. 445, 450-52 (1957). In *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940), this Court refused to exclude labor unions from the antitrust laws, in part because

> [t]he long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, . . . after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.

As the United States correctly observes, Congress has enjoyed "prolonged debate on the competitive effects of resale price maintenance, . . ." (U.S. Br. 28 n.41). As a result of that debate, Congress has chosen to perpetuate the rule of law that resale price maintenance is per se illegal.[27]

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[27] Indeed, Congress in 1975 not only endorsed the per se rule but explicitly rejected the primary justification for a change in law now offered by the United States: the "free-rider" doctrine. The Senate Report observed that opponents of the bill

> . . . were primarily service-oriented manufacturers who claimed retailers would not give adequate service unless they were guaranteed a good margin of profit. However, the manufacturer could solve this problem by placing a clause in the distributorship contract requiring the retailer to maintain adequate service. Moreover, the manufacturer has the right to select distributors who are likely to emphasize service.

Senate Report, supra note 20, at 3. *See also House Report, supra* note 21, at 4 (". . . consumers should have the freedom to choose

In short, Congress has considered this issue before and has previously rejected the justification now urged upon this Court by the United States. If there is to be a reconsideration of the rule of law, it is Congress, and not the judiciary, which should perform that task.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 13, 1983

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between paying more for those services and buying nothing but the unadorned product at a lower price from a competitor . . . customers are in fact willing to pay a somewhat higher price for the convenience, courtesy and service which small retailers are uniquely situated to provide.").